Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1992

JOHN L. BOETTNER, JR.,

Petitioner,

v.

THE COMMITTEE ON LEGAL ETHICS
OF THE WEST VIRGINIA STATE BAR,

Respondent.

Petition For Writ Of Certiorari
To The West Virginia Supreme Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether equal protection under the Fourteenth Amendment to the United States Constitution was violated by the state court's three-year suspension of the petitioner's law license based strictly upon the finality of a federal tax conviction where the federal district court which entered the conviction communicated to the state court that it was "advisable to defer a decision" pending a determination as to the finality of the conviction because of an intervening change in law by this Court in *McCormick v. United States*, 500 U.S. ___, 111 S.Ct. 1807, 114 L.Ed. 2d 307 (1991).

2. Whether the refusal of the state court to heed the advice of the federal district court to defer disciplinary action pending review of the finality of the federal tax conviction represents such a breach of federal-state comity and/or federal supremacy as to violate equal protection of the law.

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OPINIONS BELOW

The order and judgment of the West Virginia Supreme Court of Appeals, unreported, is reprinted as Appendix 2. It refused the motion of petitioner for a rehearing.

The opinion and judgment of the West Virginia Supreme Court of Appeals, unreported, is reprinted as Appendix 16-28. It finds that because the petitioner was found guilty upon his plea of guilty to the crime of federal tax evasion that a three-year suspension of his license was appropriate.

The transcript of the Status Conference before the United States District Court in *Boettner v. United States,* Civil Action No. 2:90-1037, is reprinted as Appendix 32-33.

JURISDICTION

The judgment of the West Virginia Supreme Court of Appeals suspending the petitioner's law license was entered March 24, 1992. On April 23, 1992, petitioner filed a Petition for Rehearing. The state Court below entered an Order denying the petition on May 13, 1992. On May 14, 1992, the state Court granted petitioner a 90-day stay of execution, staying its mandate of a three-year suspension pending decision by this Honorable Court.

The jurisdiction of this Court to review the judgment on petition for certiorari rests upon 28 U.S.C. § 1257(3).

STATUTE

UNITED STATES CONSTITUTION AMENDMENT XIV.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In this disciplinary proceeding against the petitioner, a lawyer and former member and Majority Leader of the West Virginia State Senate, the Committee on Legal Ethics of the West Virginia State Bar (Committee) petitioned the West Virginia Supreme Court of Appeals (state court) to annul petitioner's license to practice law without a hearing based strictly upon his plea of guilty August 30, 1989 to a single count information in the United States District Court for the Southern District of West Virginia to violating 26 U.S.C. § 7201, evasion of federal income tax.

The sole factual basis of the plea[1] and conviction concerned unauthorized payments of interest by two

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[1]**THE COURT:** Mr. Boettner, tell me in your words what is that you did as more fully charged in the single count information in this case.

(Continued on following page)

political supporters on a delinquent campaign loan which the petitioner obtained from a bank during an unsuccessful campaign for State Attorney General. The payments of interest amounted to approximately $4,000.00 and were made by check directly to the bank; one of which involved a forgery of the petitioner's signature. The petitioner later discovered the payments and failed to report them as taxable income. The Internal Revenue Service and the United States Attorney deemed the payments taxable because they were alleged to have been made to influence the petitioner's official conduct in violation of the Hobbs Act, 18 U.S.C. § 1951. The United States Attorney at sentencing admitted, however, that the evidence was that the petitioner did not recognize any particular influence. (Transcript, Sentencing, App. 9-10.)

The state court granted the request of petitioner for a due process evidentiary hearing to show mitigating factors bearing on the disciplinary sentence, but specifically

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(Continued from previous page)

MR. BOETTNER: Your Honor, I believe it was May of 1984, I obtained a campaign loan from Lowndes Bank in Clarksburg, West Virginia, which was used in the Attorney General's race at that time. Subsequent to that, there were payments of interest made on the loan which I discovered and which should have been reported apparently within the meaning of the Internal Revenue code as taxable income, which I did not report in the tax returns identified in the information.

(Transcript, Plea, App. 40.)

precluded any collateral attack on the conviction. (*Committee on Legal Ethics v. Boettner, Jr.*, ___ W.Va. ___, 394 S.E. 2d 735 (1990.)

On June 29, 1990, the mitigation hearing was held before the Hearing Subcommittee of the Committee.

Following the mitigation hearing, in a separate matter before the Internal Revenue Service during a civil appeal of his tax liability permitted by the plea agreement, the petitioner was advised by J. Timothy Philipps, Professor of Tax Law, Washington and Lee University, Lexington, Virginia, that his failure to report interest payments on a campaign loan as taxable income as set forth in the factual basis of his plea and conviction *was not a crime*, and that he had been induced under a misapprehension of the law to plead guilty to something that was not criminal?

As a result, on November 7, 1990, petitioner filed a federal habeas corpus petition [*Motion to Vacate Conviction and Sentence Pursuant to 28 U.S.C. § 2255, Civil Action No. 2:90-1037*] in the United States District Court, contending, *inter alia*, that he had been induced to plead guilty under a misapprehension of law; namely, that the interest payments on his loan used for political purposes were non-taxable campaign contributions, his failure to report the same was not a crime based upon *Rev. Ruling Proc.* 68-19, 1968-1 C.B. 1950, and that a complete miscarriage of justice had occurred.

On November 9, 1990, petitioner notified the Committee of his Motion to Vacate Conviction and requested a stay of its recommendation pending a ruling on this issue

by the federal district court, and requested that the Committee reopen his case. The Committee refused.

To add to the merits of petitioner's Motion to Vacate, this Court on May 31, 1991 reversed the Hobbs Act and federal income tax convictions of Robert McCormick, also a member of the West Virginia Legislature, *McCormick v. United States*, 500 U.S. ___, 111 S.Ct. 1807, 114 L.Ed. 2d 307 (1991), on grounds that cast further and more considerable doubt on the legitimacy of the petitioner's plea of guilty to tax evasion.

The *same* district court which accepted petitioner's plea was the *same* district court which gave the erroneous instruction overturned in *McCormick* and was obviously under the *same* misapprehension in both instances that a "voluntary" campaign contribution; i.e., "that which is freely given without expectation of benefit," is required for a non-taxable campaign contribution.

This Court made it clear in *McCormick* that there must be more than a general expectation of benefit inherent in all campaign financing to support a criminal conviction. Indeed, this Court held there must be a *quid pro quo* or an exchange of money for official action. See *McCormick*, Id. at 1,816.

Nevertheless, it remained for the petitioner to correct this miscarriage of justice through the federal court system.

Despite the best efforts of the petitioner to have this disciplinary matter deferred until the federal district court could act, the Committee on August 15, 1991 filed its findings, concluding that petitioner had failed to meet

his burden of proving mitigation and had, instead, merely asserted his innocence. The Committee recommended to the state court that his license should be annulled, and a Rule to Show Cause was issued and set for a hearing on November 6, 1991.

Again, the petitioner filed with the state court motions to stay pending a ruling by the federal district court on his *Motion to Vacate*, especially in view of the impact of the *McCormick* decision.

Prior to the hearing before the state court, the federal district court announced in a status conference on petitioner's *Motion to Vacate*, held November 1, 1991, that in view of the *McCormick* decision and the remand on the tax issue, that it was advisable to await the Fourth Circuit Court of Appeals ruling on the tax issue.

At the status conference, the federal district court was advised that the state court had before it the Committee's petition to annul the petitioner's law license based upon the conviction under review, and upon request, the federal district court communicated to the state court that it was advisable to await further action before reaching a decision. (App. 6-7.)

Ignoring the federal district court's communication, the state court, on March 24, 1992, entered judgment suspending the petitioner's law license for three years despite the communication from the federal district court, placing into doubt the finality of the petitioner's conviction.

Interestingly, although ignoring the federal district court's communication as to the finality of the conviction,

the state court made findings of fact upon which it based its decision which underscored the misapprehension of federal tax law which took place at the plea and the illegitimacy of the conviction itself:

> It was apparent that the respondent was inexperienced in the federal income tax law. (App. 26.)
>
> The loan in question was obtained to pay off respondent's back campaign expenses. (App. 24.)
>
> The interest payments were not made at respondent's request. (App. 24.)
>
> One of the payers, Mr. D'Annunzio, was a director of the bank where the loan was obtained. He apparently had been active in securing the loan for the respondent. (App. 25.)
>
> Mr. D'Annunzio was aware of the bank's concerns over the delinquency. (App. 25.)
>
> We believe some distinction can be drawn between an individual who directly receives income payments and an individual (petitioner) who is unaware of unsolicited payments made by others to third parties. (App. 26.)

Certainly, such findings by the state court, together with the federal district court's communication, had to have raised some question in its own mind about the legitimacy of the federal charges.

On April 23, 1992, the petitioner filed a petition for rehearing specifically asking the state court to address the issues raised by the federal district court's communication as to the doubtful finality of the conviction, and asserted that the state court's disregard of the federal

court communication raised the federal questions of due process and equal protection. (App. 3.)

On May 13, 1992, the state court denied the petition for rehearing, but on May 14, 1992, granted petitioner a 90-day stay of execution and stayed the mandate of its judgment pending a decision by this Court on this petition for writ of certiorari. (App. 1.)

The federal district court has not initiated any independent action to suspend the petitioner's law license.

ARGUMENT

THIS COURT SHOULD GRANT CERTIORARI TO PREVENT A MISCARRIAGE OF JUSTICE AND TO RESOLVE THE CONFLICT BETWEEN THE STATE COURT AND THE FEDERAL COURT ON THE QUESTION OF THE FINALITY OF PETITIONER'S TAX CONVICTION, AND TO RESTORE THE SUPREMACY OF THE FEDERAL DISTRICT COURT TO DETERMINE THE FINALITY OF FEDERAL CONVICTIONS USED IN STATE PROCEEDINGS

The refusal of the state court to defer its disciplinary proceeding against the petitioner in the face of a communication from the federal district court that it was advisable to do so because of a question as to the finality of the federal conviction upon which the disciplinary proceeding was based violated petitioner's right to due process and equal protection of the law in its most fundamental meaning as set forth in the Fourteenth Amendment to the United States Constitution.

Moreover, such disregard by the state court of the federal district court's jurisdiction has not only created a

conflict between the state and federal judiciary, giving rise to a fundamental usurpation of federal supremacy over the question of the finality of the petitioner's conviction, but the effect of such conflict has been to create a "black hole" in the judicial process into which the petitioner has been inexorably drawn, resulting in a fundamental miscarriage of justice.

It should be noted that the petitioner filed his § 2255 Motion November 7, 1990, *almost two years ago*, and has yet to receive a hearing or a decision despite the requirement of 28 U.S.C. § 2255 that there be prompt determination of the matter.

Because of this delay and indecision in the federal district court, on the one hand, and the puzzling refusal of the state court to defer at the request of the federal district court, on the other, the petitioner despite his diligence, good faith, and innocence of any crime, has been caught and is sinking in the swirling currents of federal and state courts moving in opposite directions resulting in a violation of due process and equal protection. See, *In Re Ruffalo*, 390 U.S. 544, 20 L.Ed. 2d 117, 88 S.Ct. 1222 (1968).

It is clear that the state court relied exclusively upon the finality of petitioner's federal tax conviction to suspend the petitioner's law license for three years, depriving him of his career as an attorney.

It is clear that the federal district court, in reviewing the finality of that conviction pursuant to a § 2255 motion, has not only raised a doubt as to the finality of that conviction, but has expressly communicated that doubt to the state court stating that it would be advisable

to await further development of this Court's decision in *McCormick*.

The action of the state court in refusing to yield to the advice of the federal district court and in ignoring the questions raised as to the finality of the conviction by the federal district court, violates principles of comity as well as equal protection.

As this Court stated in *United States v. Gillock*, 445 U.S. 360, 63 L.Ed. 2d 454, 100 S.Ct. 1185 (1980), although principles of comity between the state and federal governments do exist, comity must yield where important federal interests are at stake.

It is submitted that the supremacy of federal district courts in interpreting federal criminal statutes, including the finality of federal criminal convictions relied upon in state courts when important federal Constitution rights are involved, such as due process prior to suspension of a law license, is an important federal interest at stake.

CONCLUSION

The action of the state court in rejecting a communication from a federal district court raising doubt about a federal criminal conviction, and then proceeding to suspend a lawyer's license to practice law based strictly upon that federal conviction, has broad significance affecting the use of federal criminal convictions called into doubt by intervening changes of law to deprive a person in state proceeding of his civil rights, including the right to practice law.

It is appropriate for this Court to consider when, and under what circumstances, a federal criminal conviction, if called into doubt, can be so used, taking into account the injustices that can occur when state courts refuse to heed the exclusive jurisdiction of federal courts to determine the finality of its judgments.

Petitioner respectfully requests this Court to grant a Writ of Certiorari to the West Virginia Supreme Court of Appeals to examine that court's disregard of federal supremacy, and to correct a miscarriage of justice occasioned by such disregard.

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STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 14th day of May, 1992, the following order was made and entered:

The Committee on Legal Ethics of
The West Virginia State Bar, Complainant

vs.) No. 19211

John L. Boettner, Jr., Respondent

On a former day, to-wit, May 13, 1992, came the petitioner, John L. Boettner, Jr., by Lovett, Cooper & Glass, and James T. Cooper, his attorneys, and presented to the Court his motion in writing for a stay of execution in the above-captioned proceeding.

Upon consideration whereof, the Court is of opinion to and doth hereby grant said motion. It is therefore considered and ordered by the Court that a ninety-day stay of execution should be, and same is hereby granted, and the mandate of this Court entered herein on the 13th day of May, 1992, is stayed pending decision of the petitioner's application to the Supreme Court of the United States for a writ of certiorari therefrom; all of which is ordered to be certified to the Committee on Legal Ethics of The West Virginia State Bar and all parties hereto.

A True Copy

Attest: /s/ Ancil G. Ramey
Clerk,
Supreme Court of Appeals

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 13th day of May, 1992, the following order was made and entered:

The Committee on Legal Ethics of
The West Virginia State Bar, Complainant

vs.) No. 19211

John L. Boettner, an active
member of The West Virginia
State Bar, Respondent

The Court, having maturely considered the petition for rehearing and reargument filed in the above-captioned case, is of opinion to, and doth hereby deny the prayer of the petitioner and doth order that the final order entered herein be made absolute and certified as heretofore directed.

A True Copy

Attest: /s/ Ancil G. Ramey
Clerk,
Supreme Court of Appeals

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

THE COMMITTEE ON LEGAL ETHICS OF THE WEST VIRGINIA STATE BAR,	)	
vs.	)	NO. 19211
JOHN L. BOETTNER, JR.	)	
Petitioner-Respondent	)	

PETITION FOR REHEARING

(Filed Apr. 23, 1992)

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IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

THE COMMITTEE ON LEGAL ETHICS OF THE WEST VIRGINIA STATE BAR,	)	
vs.	)	NO. 19211
JOHN L. BOETTNER, JR.	)	
Petitioner-Respondent	)	

PETITION FOR REHEARING

Comes now the petitioner-respondent, John L. Boettner, Jr., and moves this Honorable Court pursuant to Rule 24 for a rehearing, reconsideration, and stay of the effective date of the suspension of his law license as set forth in its Opinion filed March 24, 1992.

It is respectfully suggested that this Honorable Court overlooked a breach of judicial comity and more serious violations of procedural due process and equal protection of the law by its action of suspending petitioner-respondent's law license based upon a federal court tax conviction where the federal court entering the conviction raised doubt as to the finality of that conviction because of an intervening change in law by the United States Supreme Court and directly communicated to this Honorable Court that it was advisable to await further action until the Fourth Circuit Court of Appeals ruled on the relevant tax issue on remand.

It is further respectfully suggested that this Honorable Court misapprehended that the petitioner-respondent faced other charges and bargained away those

charges in return for his plea and that the loan in question was a loan to pay off back campaign expenses.

To the extent such misapprehension resulted in this Honorable Court's decision to disregard the communication and advice of the federal court that it would be desirable to await further development of these matters, this Honorable court is asked to reconsider.

I.

EFFECTIVE DATE OF SUSPENSION

IMMEDIATE SUSPENSION DISREGARDING FEDERAL JUDGE'S COMMUNICATION VIOLATES DUE PROCESS, EQUAL PROTECTION, AND FEDERAL-STATE JUDICIAL COMITY

1. This Honorable Court overlooked in its Opinion entered March 24, 1992 that a federal judge raised the question of the finality of Mr. Boettner's federal tax conviction, upon which this proceeding is exclusively based, and expressly authorized an extraordinary and direct communication to this Honorable Court during oral argument[1] that, because of an intervening change in the law, it was " . . . advisable to defer a decision in this matter[2]

---

[1] See, *Motion to Defer Imposition of Discipline, Consistent with Actions of Judge Copenhaver,* filed November 5, 1991, with partial transcript of Judge Copenhaver's communication attached as Exhibit No. 1. This motion was neither mentioned or [sic] ruled upon by this Honorable Court.

[2] *United States v. Boettner,* Cr. No. 2:89-00170, U.S.D.C.; Pending Motion by Mr. Boettner under 28 U.S.C. §2255 to vacate Mr. Boettner's conviction entered as a result of a guilty

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until the Court of Appeals has had an opportunity to rule on the issues in the McCormick[3] case that have been returned to it by the United States Supreme Court." The text of this communication is as follows in relevant part:

* * *

> THE DEFENDANT (Mr. Boettner): Your Honor, the only pressing issue, of course, is a related matter involving the State Supreme Court affecting my law license. If I have the court's permission or some way it could be communicated that the court finds that the McCormick case in the Fourth Circuit may be very relevant to this and it's perhaps better to wait on that, if I have the court's permission to communicate that through counsel to the Supreme Court. . . . I don't want to do that unless this court authorizes it.
>
> THE COURT: I think what you could state would be something to this effect, and you might want to use the particular language I'm about to use. And that is that the court indicated

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plea, alleging, *inter alia,* that failing to report as taxable income unsolicited payments of interest by a third party on a campaign loan directly to the bank does not constitute tax evasion. This motion was filed November 7, 1990, during the course of these disciplinary proceedings. For a complete chronology, see *Petitioner's Brief in Opposition to Temporary Stay.*

[3] *McCormick v. United States,* 114 L.Ed. 2d 307 (1991). The Court held that McCormick's tax conviction could not be sustained solely as the result of Hobbs Act violations which the Court reversed, but remanded the tax issue to the 4th Circuit Court of Appeals for examination of record as to any other basis for tax conviction.

> that it may be advisable to defer a decision in this matter until the Court of Appeals has had an opportunity to rule on the issues in the McCormick case that have been returned to it by the United States Supreme Court.
>
> THE DEFENDANT: With the court's permission, I'll be happy to relate that. Thank you, Your Honor.

* * *

2. Based upon Judge Copenhaver's communication to this Honorable Court, there is a substantial probability that the conviction of Mr. Boettner will be vacated because of the intervening change in law occasioned by *McCormick*. That the federal judge who entered Mr. Boettner's guilty plea believes the development of the *McCormick* decision in the Fourth Circuit to be highly relevant, certainly raises a legitimate question as to the finality of that conviction.

3. The actions of this Honorable Court in overlooking or disregarding the communication from Judge Copenhaver during the course of these proceedings and thereafter suspending the law license of Mr. Boettner for three years, effective within 30 days, relying exclusively upon the finality of a conviction now clearly called into question, raises serious and substantial questions of due process and equal protection under the Fifth and Fourteenth Amendments of the Constitution of the United States and the State of West Virginia, as well as questions of federal-state judicial comity and principles of right and justice which need to be addressed by this Honorable Court upon a rehearing. *Selling v. Radford*, 243 U.S. 46, 616

L.Ed. 585, 37 S.Ct. 377 (1917); *In re Ruffalo,* 390 U.S. 544, 20 L.Ed. 2d 117, 88 S.Ct. 1222 (1968).

4. The failure of this Honorable Court to grant a rehearing and thereafter stay the imposition of the three-year suspension pending federal court action will result in irreparable harm and prejudice to the petitioner-respondent, and will further result in the deprivation of his livelihood in violation of the petitioner-respondent's right to due process and equal protection under the Fifth and fourteenth [sic] Amendments, aforesaid. *Selling v. Radford,* 243 U.S. 46, 616 L.Ed. 585, 37 S.Ct. 377 (1917); *In re Ruffalo,* 390 U.S. 544, 20 L.Ed. 2d 117, 88 S.Ct. 1222 (1968).

5. The failure of this Honorable court to grant a rehearing and thereafter stay the imposition of the three-year suspension pending federal court action represents such a breach of federal-state judicial comity as to violate due process and equal protection under the Fifth and Fourteenth Amendments, aforesaid.

6. Mr. Boettner's "mundane" income tax conviction,[4] not involving professional misconduct, does not constitute such a threat to the public welfare as to compel this Honorable Court to uncharacteristically disregard such a highly relevant and timely communication from the federal court so as to violate procedural due process and equal protection under the Fifth and Fourteenth Amendments, United States Constitution, rules of judicial comity, and principles of right and justice.

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[4] See Statement of Hon. John T. Copenhaver, Jr., U.S. District Judge, at Sentencing (Tr., p. 8).

7. The findings of this Court in its opinion[5] that the petitioner-respondent devoted years and a considerable amount of his time, even in private practice, to public interest work, that he was "not an individual motivated by greed," and that he was unaware of the unsolicited payments applied to his loan, all combine to lend support to the doubt raised by the federal court as to the finality of his conviction, and to this petition for rehearing to reconsider and stay the effective date of imposition of discipline pending the decision of the federal court as to the finality of his conviction.

8. The petitioner-respondent has been diligent in his efforts to prosecute his pending matter in federal court and has not sought delay. It is obvious that the petitioner-respondent has no control over the pace in which the McCormick case is proceeding in the federal court system. It is respectfully requested that this Honorable Court not issue an opinion which may have the effect of irreparably harming the petitioner-respondent for matters not within his control.

II.

MR. BOETTNER FACED NO OTHER CHARGES WHICH WERE BARGAINED AWAY

1. This Honorable Court misapprehended that Mr. Boettner had been charged with a Hobbs Act violation, 18 U.S.C. §1951, and conspiracy under 18 U.S.C. §371, and had bargained away these charges by entry of his plea of guilty to tax evasion. (See Opinion, p. 12, Footnote 12.)

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[5] See pp. 9-10, Opinion.

The entry of the plea of guilty to tax evasion was the result of a misaprehension [sic] of the federal tax law, not a plea bargain deal. As this Honorable Court noted:

> "It was apparent that the respondent was inexperienced in the federal income tax law." (Opinion, p. 9.)

2. There were never any other charges brought against Mr. Boettner, other than the tax offense, 26 U.S.C. §7201.

3. Indeed, Mr. Boettner joined with the Committee on Legal Ethics in petitioning the federal sentencing court for the release of all Grand Jury materials which showed no such charges, and that no other charges were ever bargained away.[6]

---

[6] See, *Joint Petition for Disclosure of Grand Jury Materials,* and the following dialogue on this very point:

* * *

> THE COURT: Item four seeks any grand jury action, including, but not limited to, any indictment or proposed indictment of John L. Boettner, Jr., as a defendant, coconspirator, or aider and abettor, or in any other capacity. The government answered that it didn't understand with certainty what was sought, but at any rate, you didn't think you had any.
>
> MR. SAVAGE: What apparently was being sought was, was Mr. Boettner himself indicted for something that was then dismissed. That did not happen, so they have their answer.
>
> THE COURT: Does that satisfy the State Bar on the point?

(Continued on following page)

4. The sentencing court stated during sentencing that the only charge against Mr. Boettner was the failure to pay tax.[7]

5. To the extent such misapprehension resulted in this Court's decision not to heed the advice of the federal

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MS. GUSTKE: Yes, Your Honor. What we were interested in was whether there were more serious crimes or acts alleged by the government against Mr. Boettner that were plea bargained away or otherwise dealt with which the public was unaware. And we are assured by Mr. Savage there were none, and that's – if that's his representation, we will accept it.

MR. SAVAGE: They are assured by Mr. Savage there was no grand jury action that was dismissed. Whether – I mean, the hypothetical question being, not representing one way or another, did Mr. Boettner have some potential other exposure that his information minimized, you know, presumably that happens in every case, but was there an indictment that was dismissed, in other words, was there grand jury action which is the request here, no, there was not.

THE COURT: Does that satisfy number four?

MR. LOVETT: That satisfies us, Your Honor.

MS. GUSTKE: Yes, Your Honor.

* * *

(See, Tr., Hearing, p. 9.)

[7] " . . . Nevertheless, there is no charge pending against you of unlawful conduct on your part, other than your failure to pay tax of some 1500 dollars on unreported income of some 4100 dollars for the year 1985." (Tr. Sentencing, p. 16, Judge Copenhaver.)

court to await the decision in *McCormick*, or in imposing the three-year suspension, this Honorable Court is asked to reconsider.

III.

THE LOAN IN QUESTION WAS OBTAINED DURING AND APPLIED TO MR. BOETTNER'S CAMPAIGN FOR ATTORNEY GENERAL

1. This Honorable Court has misapprehended the nature and purpose of the loan obtained by Mr. Boettner. In an earlier opinion, this Honorable Court simply refers to this as a loan:

> " . . . He obtained, through the help of a lobbyist, a bank loan." See, *Committee on Legal Ethics v. Boettner*, 183 W.Va. 136, 344 S.E. 2d 735 (1990).

In the instant matter, this Honorable court refers to this as a loan to pay off back campaign expenses:

> " . . . the loan in question was obtained to pay off respondent's back campaign expenses." See, *Committee on Legal Ethics v. Boettner.*

In fact, the loan was obtained during, and applied to, the campaign for Attorney General, as evidenced by Mr. Boettner's plea:

> "Your Honor, I believe it was May of 1984, I obtained a campaign loan from Lowndes Bank in Clarksburg, West Virginia, which was used in the Attorney General's race at that time. Subsequent to that, there were payments of interest made on that loan which I discovered and which should have reported apparently within the

meaning of the Internal Revenue Code as taxable income, which I did not report." (Tr., Plea, p. 26.)

2. The fact that this was a campaign loan used in a campaign is the essential reason that the payments of interest totalling $4,119.55 is not taxable income because under both state and federal tax, such payments would be considered campaign contributions. (See, *IRS Rev. Proc.* 68-19, 1968-1 C.B. 810; Title 53, *Legis. Rules, Sec. of State,* Series 9, Regulation of Campaign Finance, 153 CSR9.)

CONCLUSION

WHEREFORE, for the above reasons, the petitioner-respondent prays that this Honorable Court grant the motion for rehearing, reconsideration, and stay of the effective date of the three-year suspension pending a decision by the federal court on the finality of his

conviction, and such other and further relief as this Honorable Court in justice may provide.

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CERTIFICATE OF SERVICE

I, JAMES T. COOPER, do hereby certify that I served a copy of the foregoing PETITION FOR REHEARING by regular U.S. mail, postage prepaid, this 23rd day of April, 1992, upon the following:

Maria Marino Potter, Esquire
West Virginia State Bar
2006 Kanawha Boulevard, East
Charleston, WV 25311

/s/ James T. Cooper
James T. Cooper

IN THE SUPREME COURT OF APPEALS OF
WEST VIRGINIA

September 1991 Term

No. 19211

THE COMMITTEE ON LEGAL ETHICS
OF THE WEST VIRGINIA STATE BAR,
Complainant

v.

JOHN L. BOETTNER, JR., AN ACTIVE MEMBER
OF THE WEST VIRGINIA STATE BAR,
Respondent

Recommendation of the Committee on Legal Ethics
I.D. No. 89-298

Three-Year Suspension and Costs

Submitted: November 6, 1991
Filed: March 24, 1992

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James T. Cooper
Lovett, Cooper & Glass
Charleston, West Virginia
Attorney for the Respondent

JUSTICE MILLER delivered the opinion of the Court.

JUSTICE BROTHERTON dissents and reserves the right to file a dissenting opinion.

CHIEF JUSTICE MCHUGH concurs and reserves the right to file a concurring opinion.

SYLLABUS BY THE COURT

1. "Where annulment of an attorney's license is sought based on a felony conviction under Article VI, Section 23 of the Constitution, By-Laws, and Rules and Regulations of the West Virginia State Bar, due process requires the attorney be given the right to request an evidentiary hearing[.]" Syllabus Point 2, in part, *Committee on Legal Ethics v. Boettner*, 183 W. Va. 136, 394 S.E.2d 735 (1990).

2. Under Article VI, Section 35 of the Constitution, By-Laws, and Rules and Regulations of the West Virginia State Bar, disbarment of an attorney and annulment of his license are two ways of expressing the same form of punishment. The annulment of a license to practice law constitutes a disbarment. Annulment relates to the license and disbarment refers to the individual.

3. "The right to an evidentiary mitigation hearing is not automatic. In order to obtain such a hearing, the attorney must make a request therefor after the Committee on Legal Ethics files its petition with this Court under Article VI, Section 25 of the Constitution, By-Laws, and Rules and Regulations of the West Virginia State Bar." Syllabus Point 3, *Committee on Legal Ethics v. Boettner*, 183 W. Va. 136, 394 S.E.2d 735 (1990).

4. "The cases in which a mitigation hearing will be appropriate are the exception rather than the rule.

Whether a mitigation hearing is appropriate in a particular instance will depend upon a variety of factors, including but not limited to, the nature of the attorney's misconduct, surrounding facts and circumstances, previous ethical violations, the wilfulness of the conduct, and the adequacy of the attorney's previous opportunity to present evidence sufficient for a determination of appropriate sanctions." Syllabus Point 3, *Committee on Legal Ethics v. Folio*, 184 W. Va. 503, 401 S.E.2d 248 (1990).

5. " ' "In disciplinary proceedings, this Court, rather than endeavoring to establish a uniform standard of disciplinary action, will consider the facts and circumstances [in each case], including mitigating facts and circumstances, in determining what disciplinary action, if any, is appropriate, and when the committee on legal ethics initiates proceedings before this Court, it has a duty to advise this Court of all pertinent facts with reference to the charges and the recommended disciplinary action." Syl. pt. 2, *Committee on Legal Ethics v. Mullins*, 159 W. Va. 647, 226 S.E.2d 427 (1976).' Syllabus Point 2, *Committee on Legal Ethics v. Higinbotham*, [176 W. Va. 186], 342 S.E.2d 152 (1986)." Syllabus Point 4, *Committee on Legal Ethics v. Roark*, 181 W. Va. 260, 382 S.E.2d 313 (1989).

6. "Ethical violations by a lawyer holding a public office are viewed as more egregious because of the betrayal of the public trust attached to the office." Syllabus Point 3, *Committee on Legal Ethics v. Roark*, 181 W. Va. 260, 382 S.E.2d 313 (1989).

Miller, Justice:

This disciplinary case involves a conviction of the respondent attorney by guilty plea in the federal district

court for willfully evading the payment of federal income taxes under 26 U.S.C. § 7201.[1] This violation occurred when two individuals made interest payments totaling approximately $4,000 due on a bank loan obtained by the respondent.

In our earlier opinion, *Committee on Legal Ethics v. Boettner*, 183 W. Va. 136, 394 S.E.2d 735 (1990), we remanded this case for a mitigation hearing in accordance with Syllabus Point 2, in part:

> "Where annulment of an attorney's license is sought based on a felony conviction under Article VI, Section 23 of the Constitution, By-Laws, and Rules and Regulations of the West Virginia State Bar, due process requires the attorney be given the right to request an evidentiary hearing[.]"

We gave several explanations for adopting this rule.

We recognized that under Article VI, Section 23 of the Constitution, By-Laws, and Rules and Regulations of the West Virginia State Bar (Bar By-Laws), the annulment of any attorney's license was mandatory on proof of a

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[1] 26 U.S.C. § 7201 states:

> "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined. not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution."

conviction of a crime involving moral turpitude.[2] In prior cases we had determined that the willful failure to pay income taxes under 26 U.S.C. § 7201 was a crime involv ing moral turpitude. *See, e.g., In re West,* 155 W. Va. 648, 186 S.E.2d 776 (1972); *In the Matter of Mann,* 151 W. Va. 644, 154 S.E.2d 860 (1967).[3] Consequently, upon conviction of such an offense, an attorney's license would be automatically annulled. In note 5 of *Committee on Legal Ethics v. Six,* 181 W. Va. 52, ___, 380 S.E.2d 219, 221 (1989), we recognized that "annulment" is equivalent to "disbarment":

> "[I]t is clear under Article VI, Section 35 of the Bar By-Laws that disbarment of an attorney and annulment of his license are two ways of expressing the same form of punishment. 'The annulment of a license to practice law . . . shall constitute a disbarment.' Annulment relates to the license and disbarment refers to the individual."

We also recognized in *Boettner,* however, that the American Bar Association's Model Rules of Professional Conduct, which had become effective in this state on

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[2] The relevant language of Article VI, Section 23 of the Bar By-Laws provides: "The license of any attorney shall be annulled and such attorney shall be disbarred upon proof that he has been convicted – (a) of any crime involving moral turpitude or professional unfitness[.]"

[3] Syllabus Point 1 of *In the Matter of Mann, supra,* states: "A conviction of a charge of willfully attempting to evade and defeat income taxes in violation of the provision of Section 7201, Internal Revenue Code, (26 U.S.C., Section 7201), is a conviction involving moral turpitude."

January 1, 1989, had abolished the term "moral turpitude"; instead, Rule 8.4 defines "professional misconduct" as "a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer[.]" The commentary to the Model Rules states:

> "The Model Rules also eliminate the troublesome 'moral turpitude' standard of DR 1-102(A)(3) of the Model Code [of Professional Responsibility]. . . .
>
> Commentators have criticized the Model Code's reference to 'moral turpitude' as inviting subjective judgments of diverse lifestyles instead of focusing on the lawyer's ability and fitness to practice law." *Annotated Model Rules of Professional Conduct* 353-54 (American Bar Association 1984).

In view of this, we concluded in *Boettner* that there was a certain harshness about the automatic disbarment standard in tax evasion cases:

> "We find merit in Rule 8.4's abandonment of the term 'moral turpitude' and the rule's focus on the criminal act as it reflects on the attorney's fitness to practice law. Moreover, we believe that there is a certain rigidity to the approach taken in our tax evasion cases. By categorizing all tax evasion convictions as involving 'moral turpitude,' annulment of the license becomes automatic under Article VI, Section 23 of the Bar By-Laws." 183 W. Va. at ___, 394 S.E.2d at 738.

This is particularly true when we look to other jurisdictions where tax evasion cases involving attorneys are

dealt with by a suspension for a period of time rather than a total disbarment.[4]

Another factor leading to the creation of a mitigation hearing in *Boettner* was a due process consideration. This arose by virtue of the fact that under Article VI, Section 25 of the Bar By-Laws, "a certified copy of the order or conviction shall be conclusive evidence of guilt of the crime or crimes of which the attorney has been convicted."[5] Under this procedure, the attorney had no right

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[4] *See, e.g., Supreme Court Comm. on Professional Conduct v. Jones*, 256 Ark. 1106, 509 S.W.2d 294 (1974); *Florida Bar v. Ryan*, 352 So. 2d 1174 (Fla. 1977); *In re Walker*, 67 Ill. 2d 48, 7 Ill. Dec. 89, 364 N.E.2d 76 (1977); *Committee on Professional Ethics & Conduct v. Ulstad*, 376 N.W.2d 612 (Iowa 1985); *Louisiana State Bar Ass'n v. Ponder*, 340 So. 2d 134 (La. 1976), *appeal dism'd*, 431 U.S. 934, 97 S. Ct. 2643, 53 L. Ed. 2d 251 (1977); *In re Barta*, 461 N.W.2d 382 (Minn. 1990); *In re Del Mauro*, 67 N.J. 400, 341 A.2d 325 (1975); *Matter of Brown*, 75 A.D.2d 398, 429 N.Y.S.2d 810 (1980); *Allen County Bar Ass'n v. King*, 48 Ohio St. 3d 8, 548 N.E.2d 238 (1990); *Matter of Eisenberg*, 81 Wis. 2d 175, 259 N.W.2d 745 (1977), *cert. denied*, 436 U.S. 946, 98 S. Ct. 2850, 56 L. Ed. 2d 788 (1978). *See generally* Annot., 63 A.L.R.3d 512 (1975).

[5] The relevant text of Article VI, Section 25 of the Bar By-Laws reads:

> "In any proceeding to suspend or annul the license of any such attorney because of his conviction of any crime or crimes mentioned in sections twenty-three or twenty-four, a certified copy of the order or judgment of conviction shall be conclusive evidence of guilt of the crime or crimes of which the attorney has been convicted. A plea or verdict of guilty or a conviction after a plea of nolo contendere shall be deemed to be a conviction within the meaning of this section."

to any evidentiary hearing in regard to those charges which would lead to disbarment. We stated in *Boettner*: "There is general agreement that a license to practice law is a valuable right, such that its withdrawal must be accompanied by appropriate due process procedures." 183 W. Va. at ___, 394 S.E.2d at 738. (Citations omitted).

Although we created the right to apply for a mitigation hearing where annulment was sought, we surrounded it with several safeguards, as illustrated by Syllabus Point 3 of *Boettner*:

> "The right to an evidentiary mitigation hearing is not automatic. In order to obtain such a hearing, the attorney must make a request therefor after the Committee on Legal Ethics files its petition with this Court under Article VI, Section 25 of the Constitution, By-Laws, and Rules and Regulations of the West Virginia State Bar."

Moreover, in Syllabus Point 2, in part, we identified the focus of the mitigation hearing: "The purpose of such a hearing is not to attack the conviction collaterally, but to introduce mitigating factors which may bear on the disciplinary punishment to be imposed."

Subsequently, in *Committee on Legal Ethics v. Folio*, 184 W. Va. 503, 401 S.E.2d 248 (1990), we explained in Syllabus Point 3 some additional factors that should be considered in determining whether a mitigation hearing should be granted:

> "The cases in which a mitigation hearing will be appropriate are the exception rather than the rule. Whether a mitigation hearing is appropriate in a particular instance will depend upon

> a variety of factors, including but not limited to, the nature of the attorney's misconduct, surrounding facts and circumstances, previous ethical violations, the wilfulness of the conduct, and the adequacy of the attorney's previous opportunity to present evidence sufficient for a determination of appropriate sanctions."

The factors considered in *Folio* are similar to those listed by the American Bar Association in its "Standards for Imposing Lawyer Sanctions" as being relevant mitigating circumstances to justify a reduction in the degree of discipline to be imposed. These factors are: (a) absence of a prior disciplinary record; (b) absence of a dishonest or selfish motive; (c) personal or emotional problems; (d) timely good faith effort to make restitution or to rectify consequences of misconduct; (e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings; (f) inexperience in the practice of law; (g) character or reputation; (h) physical or mental disability or impairment; (i) delay in disciplinary proceedings; (j) interim rehabilitation; (k) imposition of other penalties or sanctions; (l) remorse; and (m) remoteness of prior offenses.[6]

With regard to what is an appropriate disciplinary sentence for an attorney, we have traditionally recognized that it is not possible to set a uniform standard, as we acknowledged in Syllabus Point 4 of *Committee on Legal Ethics v. Roark*, 181 W. Va. 260, 382 S.E.2d 313 (1989):

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[6] "Standards for Imposing Lawyer Discipline," 50 (American Bar Ass'n, Center for Professional Responsibility 1991 ed.).

> " ' "In disciplinary proceedings, this Court, rather than endeavoring to establish a uniform standard of disciplinary action, will consider the facts and circumstances [in each case], including mitigating facts and circumstances, in determining what disciplinary action, if any, is appropriate, and when the committee on legal ethics initiates proceedings before this Court, it has a duty to advise this Court of all pertinent facts with reference to the charges and the recommended disciplinary action." Syl. pt. 2, *Committee on Legal Ethics v. Mullins*, 159 W. Va. 647, 226 S.E.2d 427 (1976).' Syllabus Point 2, *Committee on Legal Ethics v. Higinbotham*, [176 W. Va. 186], 342 S.E.2d 152 (1986)."

Roark is also instructive on the proposition that where an attorney holds a public office his or her ethical violations are viewed more seriously, as we explained in Syllabus Point 3:

> "Ethical violations by a lawyer holding a public office are viewed as more egregious because of the betrayal of the public trust attached to the office."

In this case, the respondent was a member and majority leader of the State Senate and chairman of the Senate Judiciary Committee at the time of the offenses. The loan in question was obtained to pay off the respondent's back campaign expenses. At the mitigation hearing, much of the testimony was devoted to showing that the respondent was guilty of only a "technical" violation of the Internal Revenue Code. The respondent, along with an independent witness, sought to explain that the interest payments were not made at the respondent's request.

One of the payors, Mr. D'Annunzio, was a director of the bank where the loan was obtained.[7] He apparently had been active in securing the loan for the respondent. According to the record, Mr. D'Annunzio was aware of the bank's concern over the loan's delinquency. He made two payments totaling $3,619.55. The other payor made a payment in the amount of $500.

Testimony was also introduced on the respondent's behalf through a tax attorney, a Mr. Ricardi, as to the civil liability for income taxes owed as a result of the foregoing payments.[8] It was Mr. Ricardi's view that because the third-party payments were for interest owed the bank and because the interest was a deductible expense, any income to discharge it would be a "wash" for tax purposes.[9]

Other mitigating factors that can be gleaned from the record include the fact that the respondent has not received any other disciplinary punishment. He devoted some five years at the beginning of his law practice to legal services and public interest law groups. He also testified that even in his private practice, he has devoted a considerable amount of time to public interest work. Moreover, until this event, the respondent enjoyed a good

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[7] Mr. D'Annunzio was deceased at the time of the mitigation hearing. The record reflects that he had acted as a lobbyist.

[8] The respondent's plea agreement in connection with the criminal violation allowed him to contest his civil tax liability with the Internal Revenue Service.

[9] There was also evidence introduced by the respondent that he had not been able to obtain the cooperation of the Internal Revenue Service to settle the civil tax obligation question.

character and reputation and was regarded as a conscientious public servant.[10] Finally, we consider the offense itself. The respondent did express remorse, although this was tempered to some degree by his insistence that he was unaware of the tax consequences of the interest payments. It was apparent that the respondent was inexperienced in the federal income tax law.

Of some importance is the fact that the interest payments the respondent failed to report would have increased his taxable income of $25,046 by approximately $4,000, and increased his income tax liability $8,456 to $10,033. This is not a substantial amount. We believe some distinction can be made between an individual who directly receives income payments and an individual who is unaware of unsolicited payments made by others to third parties.

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[10] The federal judge who handled the criminal prosecution of the respondent had this to say about the respondent at the sentencing hearing:

> "Both your career and your financial history satisfy the court that you are not an individual motivated by greed, for 6 of your 21 years of practicing law were largely sacrifice[d] to the benefit of needy clientele of the Legal Aid Society and the Appalachian Research and Defense Fund. That was followed by these last 15 years in the legislature where you pursued a political career which has simply consumed your intention and attention, and proved costly to your efforts to establish a remunerative law practice."

In considering an appropriate punishment in light of the foregoing, we recognize that the Committee's recommendation of disbarment is analogous to a five-year suspension because Article VI, Section 35 of the Bar By-Laws permits a disbarred attorney to apply for reinstatement of his license to practice after five years.[11] In *Committee on Legal Ethics v. Roark, supra,* the respondent entered a guilty plea in federal district court to six misdemeanor counts of possession of cocaine. Pursuant to the plea agreement, twenty-four other counts in the indictment were dismissed. The attorney had held the offices of prosecuting attorney and Mayor of the City of Charleston during the period when the crimes were committed. Prior to the commission of these offenses, the respondent had enjoyed an excellent reputation and good character in the community. We imposed a three-year suspension.

In *Committee on Legal Ethics v. Folio, supra,* the attorney had been convicted by a jury in the federal district court on one felony count of conspiracy to obstruct justice. We refused to grant a mitigation hearing and affirmed the annulment of the attorney's license.

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[11] Article VI, Section 35 of the Bar By-Laws provides, in relevant part:

> "The annulment of a license to practice law by any court of competent jurisdiction shall revoke and terminate such license, and shall constitute a disbarment; provided, however, after the expiration of five (5) years from the date of such disbarment, a person, whose license to practice law has been or shall be annulled in this State and who shall desire reinstatement of such license, may file a verified petition [in this Court for reinstatement]."

More recently, in *Committee on Legal Ethics v. Craig*, ___ W. Va. ___, ___ S.E.2d ___ (No. 20612 2/7/92), we imposed a three-year suspension on an attorney who had worked as an administrative assistant to the governor and illegally distributed $100,000 in campaign funds. He had also received from the governor a $5,000 cash payment, which he did not initially declare on his income tax return, and admitted lying to a federal grand jury about the distribution of campaign funds. Upon becoming aware of the governor's attempt to cover up the transaction, however, the attorney had his attorney contact the federal prosecutor's office to report that he had lied to the grand jury. He subsequently testified truthfully to the grand jury and was not criminally indicted. He also filed an amended tax return to report the $5,000 payment.

In the present case, while the funds involved are not substantial and there are some mitigating factors, as earlier noted, the crime does involve a felony. The plea bargain which accompanied the guilty plea resulted in the Government's agreement not to pursue two other charges that had been investigated.[12] Under all the circumstances, we find that a three-year suspension and the payment of the costs incurred by the Committee is an appropriate sanction.

Three-year suspension
and costs.

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[12] It appears that the Government had brought charges of a Hobb's Act violation under 18 U.S.C. § 1951 and conspiracy under 18 U.S.C. § 371.

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

THE COMMITTEE ON LEGAL ETHICS OF THE WEST VIRGINIA STATE BAR,

vs.

JOHN L. BOETTNER, JR.

MOTION TO DEFER IMPOSITION OF DISCIPLINE CONSISTENT WITH THE ACTIONS OF THE HONORABLE JOHN T. COPENHAVER, JR. IN THE UNDERLYING FEDERAL CRIMINAL LITIGATION

(Filed Nov. 5, 1991)

The respondent requests this Honorable Court to defer imposition of any discipline in this matter consistent with the announcement of the Honorable John T. Copenhaver, Jr., United States District Judge, to defer that Court's decision relating to the validity of respondent's conviction in the underlying federal criminal litigation pending the ruling of the Fourth Circuit Court of Appeals on the tax issue in *United States v. McCormick*, 500 U.S. ___, 114 L.Ed. 2d 307, 111 S.Ct. ___ (1991), on remand from the United States Supreme Court.

The respondent was authorized to convey to this Honorable Court the view of Judge Copenhaver that it may be advisable to defer a decision in the matter until the Court of Appeals has had an opportunity to rule, respecting, of course, the prerogative of this Honorable Court by urging no official position here.

However, Judge Copenhaver clearly indicated that it may be desirable to wait, and the respondent respectfully

requests this Honorable Court to follow his lead as a basis for this motion.

A partial transcript of a status conference held November 1, 1991 before Judge Copenhaver is attached hereto as Respondent's Exhibit No. 1, incorporated by reference.

This request for a deferral is more fully treated in, "Supplemental Brief of Respondent To Show Cause Why His License Should Not Be Annulled," pp. 1-7.

WHEREFORE, for the reasons stated herein, the respondent moves this Honorable Court to defer imposition of discipline pending outcome of federal criminal litigation consistent with the direction of the Honorable John T. Copenhaver, Jr.

JOHN L. BOETTNER, JR.
By Counsel

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

UNITED STATES OF AMERICA,	:	CRIMINAL NO.
v.	:	2:89-00170
JOHN L. BOETTNER, JR.,	:	NOVEMBER 1, 1991
Defendant.	:	

PARTIAL TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE
JOHN T. COPENHAVER, JR.
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE UNITED STATES: JOSEPH SAVAGE
Assistant U.S. Attorney
Charleston, West Virginia

FOR THE DEFENDANT: J. TIMOTHY PHILLIPS, Attorney
ALLEN IDES, Attorney
Lexington, Virginia

COURT REPORTER: BARBARA A. STEINKE, RPR-CM
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[p. 1] PARTIAL PROCEEDINGS

* * *

THE DEFENDANT: Your Honor, the only pressing issue, of course, is a related matter involving the State Supreme Court affecting my law license. If I have the court's permission or some way it could be communicated that the court finds that the McCormick case in the Fourth Circuit may be very relevant to this and it's perhaps better to wait on that, if I have the court's permission to communicate that through counsel to the Supreme Court. I guess I'm asking whether I may have that permission to indicate the court would like to wait or is interested in waiting until the McCormick case is resolved. I think we've discussed this. It may very well be relevant, Your Honor. I think from the standpoint of this case itself, we certainly can see the court's interest in that. The question is may I – I'm sort of asking the question – relate that to the State Supreme Court in some way? I don't want to do that unless this court authorizes it.

THE COURT: I think what you could state would be something to this effect, and you might want to use the particular language I'm about to use. And that is that the court indicated that it may be advisable to defer a decision in this matter until the Court of Appeals has had an opportunity to rule on the issues in the McCormick case that have been returned to it by the United States Supreme Court.

[p. 2] THE DEFENDANT: With the court's permission, I'll be happy to relate that. Thank you, Your Honor.

THE COURT: Is that satisfactory with you, Mr. Savage?

MR. SAVAGE: So long as it's understood, and I assume it is from what the court said, that the court is not urging the State Bar to either expedite or defer its own proceedings; merely, the court is announcing what it's doing to this case.

THE COURT: That's a fair understanding. And indeed the statement that I made would not preclude the court, this court from at some point going ahead and reaching a decision in this matter. However, I have indicated that it may be desirable to wait.

* * *

REPORTER'S CERTIFICATE

I, BARBARA STEINKE, Registered Professional Certified Shorthand Reporter, do hereby certify that the foregoing hearing was duly taken and reduced to writing before me at the time and place therein mentioned, and said hearing is a true and accurate transcript from my notes. I further certify that I am neither related to any of the parties by blood or marriage, nor do I have any interest in the outcome of the above matter.

Nov. 4, 1991
Date

/s/ Barbara Steinke
BARBARA STEINKE, CSR,
RPR, CM

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

UNITED STATES OF AMERICA,	:	CRIMINAL NO. 2:89-00170
v.	:	
JOHN L. BOETTNER, JR., defendant.	:	DECEMBER 13, 1989

PARTIAL TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE
JOHN T. COPENHAVER, JR.
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE UNITED STATES:	MICHAEL W. CAREY United States Attorney JOSEPH SAVAGE Assistant U.S. Attorney Charleston, West Virginia
FOR THE DEFENDANT:	HARRY DEITZLER, Attorney Charleston, West Virginia
COURT REPORTER:	BARBARA A. STEINKE, RPR-CM 500 Quarrier Street Rm 5414 Charleston, West Virginia 25301 (304) 342-1671

[p. 6] PARTIAL PROCEEDINGS

* * *

MR. CAREY: Your Honor, briefly in response. The [p. 7] United States recognizes Mr. Boettner's prior public service and that's what gives the United States a little bit of pause. In response to Mr. Deitzler, the United States does recognize that Mr. Boettner didn't use his position like, say, Mr. McCormick did in that he didn't take advantage of people who were directly before him with pending legislation as McCormick did to demand payments.

On the other hand, I think Mr. Boettner will recognize and certainly it is the position of the United States that those payments that were made by Mr. D'Annunzio on behalf of Mr. Boettner were made solely because of Mr. Boettner's public position. In other words, had it simply been a citizen, Mr. D'Annunzio would not have made those payments. He made them so he could gain influence over Mr. Boettner because of his position. So, on the one hand, he didn't take advantage of the position to demand those payments; he did accept those payments on his behalf knowing that they were made because of his position, and that's what gives the United States concern in this case.

THE COURT: Let me ask you, Mr. Carey, is it the case perhaps that many individuals who make what are denominated perfectly lawful contributions for campaign purposes expect to have some access, indeed some influence with respect to the public official to whom those contributions have been made.

MR. CAREY: Certainly legitimate campaign [p. 8] contributions, Your Honor, but this wasn't a legitimate campaign contribution. This was the payment of interest due on a note, not during – even though the note was obtained for the purpose of financing the campaign, this was after the election was over. They were made after the campaign was completed. They were made in amounts greater than which can be legally contributed. And they were made, from what Mr. D'Annunzio told us, so that he could gain influence over him. Now, I think that goes beyond the general goodwill that campaign contributions seek to elicit.

THE COURT: And the further question arises as to whether or not those contributions, as they were, had that effect. The government, of course, has not charged that in this case. The government has charged a rather mundane income tax evasion offense here having to do with 4100 dollars in income not reported on which the tax would be some 1500 dollars. Now, of course, it is indeed a crime and it is an offense, but it certainly doesn't rise to the level of the others of these series of cases that are before the court for sentencing last week and this week.

MR. CAREY: And I didn't say that, Your Honor. I said in relation to the McCormick case, it is not the abuse of office that McCormick exhibited. On the other hand, I think Mr. Boettner recognizes, and it's the position of the United States, that those payments were made because of who he was, [p. 9] not because he was an ordinary citizen, and to gain influence over him. And I think very clearly that there came a time when Mr. D'Annunzio tried to take advantage of that relationship and direct Mr. Boettner how he should vote. So the effort

was made subsequent to those payments to take advantage of him.

THE COURT: I think your observation is correct to a point. You stated something that I would like for you to elaborate upon. You said there came a time Mr. D'Annunzio took advantage of that relationship. Did I understand you correctly?

MR. CAREY: Yes, Your Honor.

THE COURT: And what was that?

MR. CAREY: That was in relation to the dog track bill, to get Mr. Boettner to support the dog track bill when it came to a point in time where passage was uncertain and Mr. D'Annunzio directed Mr. Boettner to go out on the floor and vote for the bill.

MR. DEITZLER: Might I respond?

THE COURT: I don't see any of that in the presentence report. Do you have anything to add to that?

MR. CAREY: One moment, Your Honor.

The point that I was making, Your Honor, is that's all the circumstances were. It was Sam D'Annunzio's view that he could do that because of the money that he had paid; not that Mr. Boettner recognized that he held any particular influence [p. 10] over him, but it was Sam D'Annunzio's view that because he had paid him, that he could so, in fact, insist on his vote.

* * *

REPORTER'S CERTIFICATE

I, BARBARA STEINKE, Registered Professional Shorthand Reporter, do hereby certify that the foregoing proceedings were duly taken and reduced to writing before me at the time and place therein mentioned, and said proceedings are a true and accurate transcript from my notes. I further certify that I am neither related to any of the parties by blood or marriage, nor do I have any interest in the outcome of the above matter.

December 18, 1989 /s/ Barbara Steinke
Date BARBARA STEINKE, CSR, RPR, CM

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

UNITED STATES OF AMERICA, v. JOHN L. BOETTNER, JR., Defendant.	CRIMINAL NO. 2:89-00170 AUGUST 30, 1989

PARTIAL TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE
JOHN T. COPENHAVER, JR.
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE UNITED STATES: MICHAEL W. CAREY
United States Attorney
Charleston, West Virginia

FOR THE DEFENDANT: HARRY DEITZLER,
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[p. 26] PARTIAL PROCEEDINGS

BY THE COURT (Resuming):

Q. Mr. Boettner, tell me in your own words what it is that you did as more fully charged in the single count information in this case.

A. Your Honor, I believe it was May of 1984, I obtained a campaign loan from Lowndes Bank in Clarksburg, West Virginia, which was used in the Attorney General's race at that time. Subsequent to that, there were payments of interest made on that loan which I discovered and which should have been reported apparently within the meaning of the Internal Revenue Code as taxable income, which I did not report in the tax returns identified in the information.

Q. That is, that would have occurred then in 1985?

A. I believe that's correct, Your Honor.

Q. And tell me exactly what did take place in 1985.

A. There were payments made on the interest on the 25,000 [p. 27] dollar loan, Your Honor.

Q. And those payments that were made were made on your behalf?

A. Yes, Your Honor.

Q. And those payments amounted to what sum? Is that the difference between the 25,000 dollar figure and the 29,000 dollar figure that is set forth in the information?

A. That's correct, Your Honor. I think it was 4,000 dollars or something like that.

Q. And that sum of 4,000 dollars constituted income to you, did it?

A. That's my understanding of the Internal Revenue Code, Your Honor, yes.

* * *

REPORTER'S CERTIFICATE

I, BARBARA STEINKE, Registered Professional Shorthand Reporter, do hereby certify that the foregoing proceedings were duly taken and reduced to writing before me at the time and place therein mentioned, and said proceedings are a true and accurate transcript from my notes. I further certify that I am neither related to any of the parties by blood or marriage, nor do I have any interest in the outcome of the above matter.

November 6, 1989 /s/ Barbara Steinke
Date BARBARA STEINKE, CSR, RPR, CM